United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with Affidavit of Mailing

76-6109

To be argued by
LEWIS F. TESSER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6109

B
P/S

HUNTINGTON TOWERS, LTD.
and RICHARD CAREY,
Plaintiffs-Appellants,

against

FRANKLIN NATIONAL BANK (in liquidation) and FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants,

FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK, and JAMES SMITH, individually and as Comptroller of the Currency,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE JAMES SMITH, Individually and as Comptroller of the Currency

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
LEWIS F. TESSER,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

Counterstatement of the Case 1

Summary of Argument 2

Statement of Facts 2

Counterstatement of the Issues Presented for Review 6

ARGUMENT:

POINT I—The Court lacks jurisdiction over the subject matter of this action in that plaintiffs seek to maintain an unconsented suit against the United States 6

POINT II—The Complaint was properly dismissed against James Smith inasmuch as the Comptroller performed acts only in his official capacity and in the exercise of statutory responsibilities 9

CONCLUSION 15

TABLE OF CITATIONS

Cases:

Alzua v. *Johnson*, 231 U.S. 106 (1913) 10

Anderson v. *United States*, 229 F.2d 675 (5th Cir. 1956) 7

Barr v. *Matteo*, 360 U.S. 564 (1959) 10, 12, 15

Bershad v. *Wood*, 290 F.2d 714 (9th Cir. 1961) 15

Cooper v. *O'Connor*, 99 F.2d 135 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 642 (1938), *rehearing denied*, 305 U.S. 673 (1938) 11, 12

PAGE

Donofrio v. *Camp*, 470 F.2d 428 (D.C. Cir. 1972) .. 13

Dugan v. *Rank*, 372 U.S. 609 (1963) 7, 8

Gregoire v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 12, 15

Hawaii v. *Gordon*, 373 U.S. 57 (1963) 7, 8

Howard v. *Lyons*, 360 U.S. 593 (1959) 10

Kendall v. *Stokes*, 44 U.S. 92 (1845) 10

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949) 7, 8

Mallone v. *Bowdoin*, 369 U.S. 643 (1962) 7, 8

Marbury v. *Madison*, 5 U.S. (1 Cr.) 138 (1803) ... 8

Marsh v. *Kitchen*, 480 F.2d 1270 (2d Cir. 1973) .. 6

Marston v. *Gant*, 351 F. Supp. 1122 (E.D. Va. 1972) 6

Molever v. *Lindsey*, 289 F. Supp. 832 (E.D. Mich. 1968), *aff'd*, 411 F.2d 597 (6th Cir. 1969) .. 12, 14

Relf v. *Gasch*, 511 F.2d 804 (D.C. Cir. 1975) 6

Rimar v. *McCowan*, 374 F. Supp. 1179 (E.D. Mich. 1974) 6

Tenney v. *Brandhove*, 341 U.S. 367 (1951) 12

United States v. *King*, 395 U.S. 1 (1969) 7, 8

United States v. *Mel's Lockers, Inc.*, 346 F.2d 168 (10th Cir. 1965) 7

United States v. *Sherwood*, 312 U.S. 584 (1941) ... 6, 7

Yaselli v. *Goff*, 275 U.S. 503 (1927) 10

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6109

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,
Plaintiffs-Appellants,

against

FRANKLIN NATIONAL BANK (in liquidation) and FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants,

FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK, and JAMES SMITH, individually and as Comptroller of the Currency,
Defendants-Appellees.

BRIEF FOR THE APPELLEE JAMES SMITH, Individually and as Comptroller of the Currency

Counterstatement of the Case

By this action, plaintiff-appellant Huntington Towers, Ltd. (a borrower from the Franklin National Bank, Brooklyn, New York) and plaintiff Richard Carey (the Corporation's sole stockholder) seek monetary damages from the defendant-appellee Comptroller as compensation for alleged injuries suffered as a result of alleged fraudulent misrepresentations by appellees of the condition of Franklin National Bank from May 1, 1974 to October 8, 1974.

Appellants also allege injury as a result of alleged agreements among appellees resulting in the Federal Reserve Bank's status as a preferred creditor. Appellants claim damages in the amount of $8,000,000. (Complaint ¶¶ 6, 7, 17, 20, 21; JA 4-9).[1]

Appellants' complaint was served on or about May 29, 1975. On June 30, 1975, venue was transferred from the United States District Court for the Southern District of New York to this Court. The Comptroller moved to dismiss the complaint (JA 107-127) and on July 1, 1976, Judge Orrin G. Judd entered a final Order which granted the Comptroller's motion and dismissed the complaint.

Summary of Argument

The District Court did not err when it dismissed the appellant's complaint. First, the Court lacked jurisdiction over the subject matter of the action in that appellants seek to maintain an unconsented suit against the United States. Second, as demonstrated, by the affidavit of the Comptroller (JA 115-124) and the Secretary of the Treasury (JA 125-126), the Comptroller was at all times acting within the scope of his official duties and pursuant to his statutory responsibilities, and, therefore, he is immune from personal liability or suit based upon those actions. The appellant has never alleged that the Comptroller acted outside the scope of his authority.

Statement of Facts

Appellants are a New York business corporation—a borrower from Franklin National Bank—and its sole stockholder. Appellee Comptroller of the Currency is the

---

[1] "JA" followed by a number or numbers refers to the page or pages of the Joint Appendix.

chief administrative officer of a Bureau of the Treasury Department and is responsible for the supervision and regulation of national banks. 12 U.S.C. § 1, *et seq.* Among his duties, the Comptroller determines when a receiver should be appointed to close up a national bank because the Comptroller has become satisfied of the bank's insolvency. 12 U.S.C. § 191. (Smith Affidavit, ¶ 2, JA 115).

The pertinent facts and circumstances regarding the performance of official duties by the Comptroller of the Currency during the period alleged in plaintiffs' complaint follow:

As a result of a regular examination of Franklin National Bank by the Office of the Comptroller of the Currency from November 1973 through March 1974, the Comptroller's Office became aware that Franklin National Bank had serious financial problems. It was apparent that at least 50 percent of the bank's total liabilities were of a highly volatile nature (short-term obligations) and that these would likely be withdrawn from the bank rapidly in the event that there was any reason to question the soundness or stability of Franklin National Bank. (Smith Affidavit, ¶ 4, JA 116-117). Should these short-term deposits be withdrawn, the bank would have faced a liquidity crisis.

In addition, the bank examination disclosed at least $10 million of uncollectable loans and $275 million of otherwise criticized loans, all of which amounted to 162 percent of the bank's equity capital. It was apparent that the bank's condition could easily cause a loss of confidence and a consequent serious liquidity crisis *(Ibid.)*.

On Sunday, May 12, 1974, the bank's parent holding company, Franklin New York Corporation, announced a

$12 million loss resulting from the bank's speculation in foreign currencies. It was estimated that additional losses might be as high as $25 million. The Corporation also requested the Securities and Exchange Commission to suspend trading in the company's securities. (Smith Affidavit, ¶ 6, JA 118).

These announcements caused a dramatic decline in the ability of Franklin National Bank to borrow funds. Moreover, a large run-off of borrowings and money-market instruments caused a severe cash drain which Franklin National Bank could meet only by large borrowings from the Federal Reserve Bank of New York. Because Franklin National Bank was unable to sell the contents of its loan portfolio and other assets of the bank, Franklin remained largely dependent upon its borrowings from the Federal Reserve Bank of New York to meet its need for cash. (Smith Affidavit, ¶ 7, JA 118).

Announcements on June 20, 1974, by Franklin New York Corporation of Franklin National Bank's losses and the Corporation's restated earnings for the first quarter of 1974 to show a net loss with estimates of further losses in the second quarter and for the whole year, further dramatically weakened the position of the bank. (Smith Affidavit, ¶ 8, JA 119).

During May and the succeeding months, the Comptroller's Office was actively engaged in the development of long-term solutions to the problems of Franklin National Bank. Such activities included obtaining sources of borrowed funds for Franklin National Bank (Smith Affidavit, ¶¶ 9 and 10, JA 119-120); negotiations with other commercial banks for the purchase of Franklin's Eurocurrency loans (Smith Affidavit, ¶ 11, JA 120); inquiries of several commercial banks to purchase Franklin

National Bank (Smith Affidavit, ¶ 12, JA 120-121); and negotiations with the FDIC to develop a plan to assist a purchase and assumption of Franklin's assets and liabilities by another commercial bank. (Smih Affidavit, ¶ 13, JA 121).

On August 14, 1974, a special examination of Franklin National Bank was initiated which revealed a substantial impairment of the bank's equity capital. (Smith Affidavit, ¶ 14, JA 121).

On October 7, 1974, the Federal Reserve Bank of New York informed the Comptroller that it no longer viewed the continuation of its program of credit assistance to Franklin National Bank to be in the public interest, but that it believed that the plan developed by the FDIC to assist a purchase and assumption of the assets and liabilities of the bank should be the solution to the bank's problems. (Smith Affidavit, ¶ 15, JA 122).

Based upon all of the facts and information available, the Comptroller became satisfied of the insolvency of Franklin National Bank and at 3 p.m. on October 8, 1974, declared the bank to be insolvent and appointed the FDIC as receiver. (Smith Affidavit, ¶¶ 16 and 17, JA 122-123).

On October 8, 1974, the District Court approved the FDIC's proposal for a purchase and assumption of the assets and liabilities of Franklin National Bank by European American Bank. (Smith Affidavit, ¶ 19, JA 124).

Statutes Involved

The federal statutory provisions involved are 12 U.S.C. §§ 191, 194 and 1821, the pertinent portions of which are reproduced as an Addendum hereto.

Counterstatement of the Issues Presented for Review

1. Did the District Court have subject matter jurisdiction of this action?

2. Did the District Court properly dismiss this action against James Smith—one person acting in his official capacity as Comptroller of this Currency?

ARGUMENT

POINT I

The Court lacks jurisdiction over the subject matter of this action in that plaintiffs seeks to maintain an unconsented suit against the United States.[2]

The appellants have sued the Comptroller of the Currency. Since the only relief requested of him is monetary damages, the suit is in actuality an action against the United States. The appellants have cited no statutory basis for this suit against the sovereign.

Consent of the United States to be sued cannot be implied. *United States* v. *Sherwood*, 312 U.S. 584 (1941).

---

[2] Point II of the Appellants' brief is that the court has personal jurisdiction over the Comptroller. The District Court did not reach the issue because it held that there was no subject matter jurisdiction. Even so, in their complaint or otherwise, the appellants never alleged facts sufficient to find that *in personam* jurisdiction was ever present. This Court thus lacks *in personam* jurisdiction over James F. Smith as a defendant in his individual capacity. *Marsh* v. *Kitchen*, 480 F.2d 1270 (2d Cir. 1973); *see Relf* v. *Gasch*, 511 F.2d 804 (D.C. Cir. 1975); *Rimar* v. *McCowan*, 374 F. Supp. 1179 (E.D. Mich. 1974); and *Marston* v. *Gant*, 351 F. Supp. 1122 (E.D. Va. 1972).

It must be granted expressly by statute, and such statutes are construed strictly; the jurisdiction of the Court depends upon exact compliance with the terms of the statutory grant. *United States* v. *King*, 395 U.S. 1 (1969); *United States* v. *Sherwood, supra* at 586. *See also, United States* v. *Mel's Lockers Inc.*, 346 F.2d 168 (10th Cir. 1965); *Anderson* v. *United States*, 229 F.2d 675 (5th Cir. 1956). Moreover, the nature of an action as an unconsented suit against the United States cannot be avoided simply by naming as a defendant a government official who is responsible for the complained of action rather than the United States. *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Mallone* v. *Bowdoin*, 369 U.S. 643 (1962); and *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).[3]

In their complaint, the appellants identify the appellee Smith in his official capacity: "Defendant James Smith (hereinafter referred to as "Smith") is and was at all times hereinafter mentioned Comptroller of the Currency." (Complaint, ¶ 2(d), JA 4). Appellants thereby concede the appellee's status as an official of the government of the United States with respect to all allegations contained in plaintiffs' complaint. See also, Defendant Comptroller's

---

[3] Thus, in *Hawaii* v. *Gordon, supra,* the Supreme Court dismissed the state's challenge to a determination of the Director of the Bureau of the Budget as an unconsented suit against the United States stating at page 58:

> We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. * * * Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies, and cause as well the disposition of property admittedly belonging to the United States. The complaint is therefore dismissed.

Statement Of Material Facts As To Which There Is No Genuine Issue ¶ 1, JA 111 and Plaintiffs Counterstatement Pursuant to Rule 9(g) in Opposition ¶ 1, JA 127. Moreover, appellants do not allege that the Comptroller's actions were in any way beyond the scope of his authority. To the contrary, they allege that they are entitled to recover monetary damages from one who was acting in his official capacity as an officer of the United States. The Supreme Court held in *Larson, supra,* that the test for determining whether or not a lawsuit is one against the sovereign is whether the relief sought will cause the sovereign to act or refrain from acting or affect sovereign property. Plaintiffs here clearly demand payment of $8,000,000 in damages from the United States Treasury, but cite no statutory basis for the District Court's jurisdiction. Such an action against the sovereign cannot be maintained without express statutory consent.[4]

No such consent can be found in the provisions of the National Bank Act, and on this basis alone this action was properly dismissed in accord with the Supreme Court's reasoning in *United States* v. *King, supra.* In *King,* the Supreme Court reversed the Court of Claims' holding that it has implied jurisdiction under the Declaratory Judgment Act of 1934 (28 U.S.C. § 2201) to

---

[4] *Hawaii* v. *Gordon; Dugan* v. *Rank; Mallone* v. *Bowdoin* and *Larson* v. *Domestic and Foreign Commerce Corp.,* all *supra.*

In Point III of their brief, appellants argue that 28, U.S.C. § 1361 provides the Court jurisdiction. However, plaintiffs' complaint does not request relief in the form of mandamus. Moreover, it is clear that the acts of the Comptroller are discretionary in nature. *Marbury* v. *Madison,* 5 U.S. (1st Cir.) 138 (1803). Additionally, appellants have not pointed to any "duty owed to the plaintiff".

Moreover, appellants' claim that the Federal Reserve Board's security interest in Franklin's assets violates the principle of ratable distribution is premature because appellants are clearly debtors, not creditors, of Franklin. They cannot become creditors

[Footnote continued on following page]

issue declaratory judgments. The Supreme Court stated, (305 U.S. at page 4):

> For the Court below, it is sufficient that there was no clear indication that the Congress affirmatively intended to exclude the Court of Claims from the scope of the Declaratory Judgment Act. We think that this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied, but must be unequivocally expressed. *United States* v. *Sherwood*, 312 U.S. 584.

The Supreme Court's reasoning in *King* was expressly adopted by the Court below. In this case, the appellant has pointed to no waiver of sovereign immunity, express or implied. Consequently, the District Court properly dismissed this action against the Comptroller of the Currency.

POINT II

The Complaint was properly dismissed against James Smith inasmuch as the Comptroller performed acts only in his official capacity and in the exercise of statutory responsibilities.

The appellant does contest the government's position that Mr. Smith's actions, complained of in the present case, were without exception actions performd in the exercise of the statutory responsibilities vested in the Comptroller's Office (see, *e.g.*, 12 U.S.C. §§ 191, 481).

---

unless they prevail on the claims they assert against Franklin (JA 6). Even if appellants had standings to make such a claim, the Comptroller would not be a proper party because the FDIC, as receiver, is not subject to supervision or direction by the Comptroller. 12 U.S.C. § 1821(d).

During the period alleged in the appellants' complaint, the Comptroller, in attempting to find a long-range solution to Franklin National Bank's problems, attempted to discover potential sources of cash for the bank, negotiated the sales of certain assets of the bank, negotiated with other banks the potential purchase of Franklin National Bank, and finally requested the FDIC to develop a proposal for an assisted purchased and assumption of the bank's assets and liabilities. *See* Comptroller's Statement of Material Facts As To Which There Is No Genuine Issue, JA 111-114.

It is well-settled that no action can be brought or tried against a federal official such as the Comptroller for acts committed within the ambit of the Comptroller's official authority and in pursuance of his official duties. *Barr* v. *Matteo*, 360 U.S. 564 (1959) and *Howard* v. *Lyons*, 360 U.S. 593 (1959). This principle is one of long standing.[5]

The reason for the "official immunity doctrine" was articulated by the Supreme Court in *Barr* v. *Matteo*, *supra*, (360 U.S. at 571):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. *Matteo* was a dafamation action. The defendant government official had issued a press release

---

[5] See, *e.g.*, *Yaselli* v. *Goff*, 275 U.S. 503 (1927); *Alzua* v. *Johnson*, 231 U.S. 106 (1913); and *Kendall* v. *Stokes*, 44 U.S. 92 (1845).

which was alleged to be false, injurious to plaintiff, and "actuated by malice." 380 U.S. at 568. The Supreme Court held that the complaint was absolutely barred because the defendant government official's press release was limited to "matters committed by law to his control or supervision" and that:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint * * *.

360 U.S. at 573, 575.

In one "official immunity" case involving the Comptroller of the Currency, *Cooper* v. *O'Connor*, 99 F.2d 135 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 642 (1938), *rehearing denied*, 305 U.S. 673 (1938), the Court of Appeals affirmed the District Court's dismissal of a complaint for malicious prosecution against the Comptroller holding (99 F.2d at 139):

> It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute * * *; or even that they should be specifically directed or requested by a superior officer. * * * It is sufficient if they are done by an officer "*in relation* to matters committed by law to his control or supervision." * * * or that they have "*more or less connection with* the general matters committed by law to his control or supervision." * * * or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

The only issue in this case is whether the Comptroller's activities were " * * * done by an officer '*in relation* to

matters committed by law to his control or supervision' * * *," or had " * * * *'more or less connection with* the general matters committed by law to his control or supervision'." *Cooper* v. *O'Connor, supra,* 99 F.2d at 139. This determination "is a question of law" and, since there is no factual matter in dispute concerning the scope of the Comptroller's duties, or of his actions, " * * * he is entitled to a judgment as a matter of law." *Molever* v. *Lindsey,* 289 F. Supp. 832, 833, 835 (E.D. Mich. 1968), *aff'd,* 411 F.2d 597 (6th Cir. 1969).[6]

The reason for disposing of cases such as this one summarily is to prevent " * * * suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr* v. *Matteo, supra; accord, Tenney* v. *Brandhove,* 341 U.S. 367, 377 (1951). As Judge Hand stated in *Gregoire* v. *Biddle,* 177 F.2d 579 (2d Cir. 1949) at page 581:

> * * * [I]t is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

---

[6] Moreover, the Comptroller has, as a matter of law, no duty to make known the condition of a bank to the bank's customers. And, here, the Comptroller's affidavit demonstrates that the Comptroller took no action with respect to the plaintiffs' loans. Indeed, the FDIC, as receiver, is not subject to control by the Comptroller nor is defendant European American, a state-chartered bank. (Smith Affidavit, ¶¶ 17 and 18).

Therefore, in *Donofrio* v. *Camp*, 470 F.2d 428 (D.C. Cir. 1972), a defamation action against the Comptroller of the Currency, the Court of Appeals, in affirming the District Court's granting of summary judgment in favor of the Comptroller, held (470 F.2d at 432):

> Finally, appellee's affidavits establish a *prima facie* case that he is entitled to judgment as a matter of law. There is nothing in the record to suggest that even if the purported Ross-Camp exchange had taken place, it was not privileged under the doctrine of official immunity. Donofrio's allegations described a communication in which one federal agency passed on information obtained in performing its regulatory functions to another whose investigations concerned the same subject. Such a communication would clearly have been within the scope of appellee's official duties, hence protected by the absolute privilege of Barr v. Matteo.
>
> Even if, as appellant suggests, his sought after discovery would have produced evidence that the alleged slanderous remarks were made with malice,
>
> > [t]he fact that the action here taken was within the outer perimeter of [appellee's] line of duty is enough to render the privilege applicable despite the allegations of malice in the complaint . . . . Barr v. Matteo, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959).
>
> To have allowed this suit to have continued further in light of the strong suggestion from the record that the suit was groundless might, itself, have directly contravened the rationale of *Barr*. A federal official's immunity is to suit as well as liability; even prolonging discovery in this

> case ". . . would consume time and energies which would otherwise be devoted to governmental service and the threat of [such discovery] might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." [Footnotes omitted.]

Another case of significance here is *Molever* v. *Lindsey*, 289 F. Supp. 832 (E.D. Mich. 1968), *aff'd*, 411 F.2d 597 (6th Cir. 1969)—a slander action against a Federal Deposit Insurance Corporation bank examiner. The complaint alleged that the defendant bank examiner had been present at a meeting of the board of directors of the Bank of Wheeling. The bank examiner was alleged to have stated that the plaintiff, in his capacity as president of the bank, " * * * was guilty of misapplication of funds and false entry." 289 F. Supp. at 833. The Court viewed the issue as follows (289 F. Supp. at 833):

> The issue before the Court, therefore, is whether there is any genuine issue of fact bearing on the critical issue of the scope of the defendant's duties and whether the immunity extends to him so that he is enitled to a judgment as a matter of law. Mere allegations or statements that the defamatory statement was made outside the perimeter of the defendant's duties does not make it so. Whether the statement was made within the scope of the defendant's course of duties is a question of law which we decide on the uncontroverted facts.

The Court found that " * * * the conduct of the defendant was within the normal scope of his power * * * " and

granted the defendant's motion for summary judgment. 289 F. Supp. at 834-835.[7]

In the instant case, the appellants have not pointed to any act of James Smith said to be outside the scope of his duties as Comptroller.

CONCLUSION

For the reasons stated above, the defendant Comptroller's motion to dismiss was properly granted and the order below should be affirmed in all respects.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
LEWIS F. TESSER,
Assistant United States Attorneys,
Of Counsel.

---

[7] The Court might wish to take special note of Judge Learned Hand's often cited opinion in *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 J.S. 949 (1950), which was quoted at length by the Supreme Court in *Barr* v. *Matteo*. *See also*, *Bershad* v. *Wood*, 290 F.2d 714, 715 (9th Cir. 1961) where the immunity of government officials was upheld even though the defendants were alleged to have acted "* * * wrongfully, maliciously, without probable cause and in wilful disregard of the rights of plaintiff * * *."

ADDENDUM

ADDENDUM TO APPELLEE'S BRIEF

THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA

TITLE 12.—BANKS AND BANKING

CHAPTER 2.—NATIONAL BANKS

RECEIVERSHIP

191. General grounds for appointment of receiver. Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United Sates [§ 93 of this title], or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association. June 30, 1876, c. 156, § 1, 19 Stat. 63; Sept. 8, 1959, P. L. 86-230, § 16, 73 Stat. 458.)

* * * * *

194. Dividends on adjusted claims—Distribution of assets.—From time to time, after all provision has been first made for refunding to the United States and deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money

so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives, in proportion to the stock by them respectively held. (R.S. § 5236.)

* * * * *

CHAPTER 16.—FEDERAL DEPOSIT INSURANCE CORPORATION

1821. Permanent Insurance Fund—Payment of claims —Organization of new bank.—

* * * * *

(c) Notwithstanding any other provision of law, whenever the Comptroller of the Currency shall appoint a receiver other than a conservator of any insured national bank or insured District bank, or of any non-insured national bank or District bank hereafter closed, he shall appoint the Corporation receiver for such closed bank.

(d) *Notwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver* to cause notice to be given by advertisement in such newspaper as it may direct, to all persons having claims against such closed bank pursuant to section 5235 of the Revised Statutes (U. S. C. title 12, sec. 193) [§ 193 of this title]; to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; *and to wind up the affairs of such closed bank in conformity with the provisions of law relat-*

ing to the liquidation of closed national banks, except as herein otherwise provided. The Corporation as such receiver, shall pay to itself for its own account such portion of the amounts realized from such liquidations as it shall be entitled to receive on account of its subrogation to the claims of depositors, and *it shall pay to depositors and other creditors the net amounts available for distribution to them.* The Corporation as such receiver, however, may, in its discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to the aforesaid section of the Revised Statutes [§ 193 of this title], and no liability shall attach to the Corporation itself or as such receiver by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank and *notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency.* (Emphasis added.)

★ U. S. Government Printing Office 1976— 714—018—19

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of December 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee James Smith, Individually and as Comptroller of the Currency

by placing the same in a properly postpaid franked envelope addressed to:

Donald E. Sheil, Esq.
Two Pennsylvania Plaza, Suite 1500
New York, N. Y. 10001

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Mailing Division~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

Sworn to before me this
2nd day of December 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 19 77